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8  
9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
11

12 SASAN MIRKARIMI, individually and  
on behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 NEVADA PROPERTY 1, LLC, a  
16 Delaware limited liability company  
DBA THE COSMOPOLITAN HOTEL  
17 OF LAS VEGAS, and DOES 1-50,  
inclusive,

18 Defendant.  
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CASE NO. 12-CV-2160 BTM (DHB)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S UNOPPOSED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: June 19, 2015

Time: 11:00 a.m.

Ctrm: 15B

Judge: Hon. Barry Ted Moskowitz

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1 **I. INTRODUCTION**

2 In this putative class action, plaintiff Sasan Mirkarimi (“plaintiff”) alleges that  
3 defendant Nevada Property 1 LLC, d/b/a The Cosmopolitan of Las Vegas (“The  
4 Cosmopolitan” or defendant”), recorded telephone calls made to or received from  
5 California residents without their consent, in violation of the California Invasion of  
6 Privacy Act, Cal. Penal Code §§ 632 and 632.7 (the “Privacy Act”). After nearly  
7 three years of litigation, the parties have reached a settlement which, upon final  
8 court approval, will resolve the claims of plaintiff and all putative class members.  
9 Plaintiff requests that the Court preliminarily approve the parties’ Settlement  
10 Agreement (“Agreement” or “Settlement”), which is submitted as Exhibit 1 to the  
11 Declaration of James T. Hannink filed herewith.

12 The Settlement is the result of hard-fought litigation over many contested  
13 legal and factual issues. The litigation involved a motion to transfer, a motion to  
14 dismiss, a motion to strike class allegations, extensive written and deposition  
15 discovery, voluminous document production, third-party discovery, numerous  
16 discovery conferences between counsel and with the Court, and several contested  
17 discovery motions. The proposed settlement was reached following a full-day  
18 mediation session on February 20, 2015.

19 The Settlement provides that The Cosmopolitan will pay monetary  
20 consideration of Fourteen Million Five Hundred Thousand Dollars (\$14,500,000).  
21 After Court-approved deductions, all funds will be distributed to Participating Class  
22 Members who submit timely and valid claims. The monetary amount is non-  
23 reversionary. Any undistributed funds (due to settlement checks that are uncashed  
24 120 days after mailing) will be distributed to a Court-approved *cy pres* recipient.

25 Plaintiff’s counsel believe the Settlement is in the best interests of the putative  
26 class and should be approved. Plaintiff requests that the Court enter an order:  
27 (1) preliminarily approving the proposed Settlement; (2) conditionally certifying the  
28 class described herein for settlement purposes; (3) appointing, for settlement

1 purposes only, the law firm of Dostart Clapp Hannink & Coveney, LLP as Class  
2 Counsel; (4) appointing, for settlement purposes only, Sasan Mirkarimi as the Class  
3 Representative; (5) appointing CPT Group, Inc. as the Claims Administrator;  
4 (6) approving the proposed Class Notice, Publication Notice, Claim Forms, and the  
5 agreed-upon plan for mailing and publication; and (7) setting a final approval  
6 hearing for approximately 120 days after the Court enters preliminary approval.

## 7 **II. FACTUAL BACKGROUND**

8 Plaintiff Sasan Mirkarimi is an individual who resides in San Diego County,  
9 California. Defendant is a Delaware limited liability company that operates a luxury  
10 hotel and casino in Las Vegas, Nevada.

11 Plaintiff commenced this lawsuit on July 12, 2012 by filing a complaint in the  
12 San Diego County Superior Court. Dkt. 1-1. On August 31, 2012, The  
13 Cosmopolitan removed the action to this Court. Dkt. 1.

14 This case was vigorously contested from the outset. On September 7, 2012,  
15 The Cosmopolitan responded to the Complaint with a Motion to Transfer Venue  
16 (Dkt. 6) and a Motion to Dismiss or, In the Alternative, to Strike the Class  
17 Allegations (Dkt. 7). Plaintiff filed a First Amended Complaint on September 25,  
18 2012. Dkt. 8. On October 9, 2012, The Cosmopolitan re-filed its Motion to Dismiss  
19 or, In the Alternative, to Dismiss Class Allegations. Dkt. 15. After the Motion to  
20 Transfer Venue was fully briefed and taken under submission, the motion was  
21 withdrawn. Dkt. 38. On July 15, 2013, the Court entered an order denying the  
22 Motion to Dismiss and denying the Motion to Strike Class Allegations. Dkt. 40.  
23 The Cosmopolitan filed its Answer on August 2, 2013. Dkt. 41.

24 On October 24, 2013, the parties participated in an Early Neutral Evaluation  
25 Conference before Magistrate Judge David H. Bartick. The case did not settle, so  
26 the parties thereafter conducted a Rule 26(f) conference and commenced formal  
27 discovery in November 2013. Hannink Decl. ¶ 9.

1 During the ensuing fifteen months, the parties engaged in extensive  
2 discovery. Plaintiff's written discovery included propounding seven sets of requests  
3 for production (totaling 185 document requests); five sets of interrogatories (totaling  
4 36 interrogatories); and two sets of requests for admissions (totaling 19 requests).  
5 The written discovery gave rise to a number of disputes on which the parties met  
6 and conferred in accordance with Fed. R. Civ. P. 37 and Magistrate Judge Bartick's  
7 Chamber's Rules. During the meet and confer efforts, The Cosmopolitan agreed to  
8 supplement many of its written responses and to produce many of the requested  
9 documents. Altogether, The Cosmopolitan served a total of 28 sets of initial and  
10 supplemental responses to interrogatories, requests for production, and requests for  
11 admission, and produced Excel spreadsheets and other documents amounting to tens  
12 of thousands of pages. Hannink Decl. ¶ 10.

13 The parties' extensive meet and confer efforts resolved many discovery  
14 issues. However, the parties reached an impasse on several issues that were briefed  
15 for the Court. On October 22, 2014, Magistrate Judge Bartick entered an Order  
16 Regarding Joint Motion for Determination of Discovery Dispute, which granted in  
17 part plaintiff's request to compel further responses to interrogatories and production  
18 of documents. Dkt. 76. On November 21, 2014, Magistrate Judge Bartick entered  
19 another Order Resolving Joint Motion for Determination of Discovery Dispute,  
20 which granted plaintiff's request to lift a stay on communications with putative class  
21 members. Dkt. 91. Plaintiff took nine depositions, and obtained discovery from  
22 third parties pursuant to Rule 45 subpoenas. Hannink Decl. ¶ 9.

23 Among other information, plaintiff sought production of call system metadata  
24 reflecting the recorded calls at issue, including the date, time, and duration of each  
25 call, and the telephone numbers involved. It was eventually determined that the  
26 system metadata is available for months beginning with June 2012, but not for  
27 earlier months. Dkt. 84-4, ¶ 13.



1 After extensive discovery, and as the class certification deadlines drew near,  
2 the parties agreed to participate in mediation. The mediation took place on February  
3 20, 2015 in San Francisco, California, before mediator David A. Rotman, and  
4 resulted in an agreed term sheet. Thereafter, the parties finalized settlement  
5 documents and the Settlement Agreement was signed on May 8, 2015. At all times,  
6 the settlement negotiations, while cordial, were adversarial, non-collusive, and were  
7 conducted at arm's-length. Hannink Decl. ¶ 14.

8 Defendant expressly denies any liability or wrongdoing of any kind  
9 associated with the claims alleged in the action, and further contends that, for any  
10 purposes other than settlement, this action is not appropriate for class treatment. By  
11 entering into the Settlement Agreement, Defendant did not admit or concede any  
12 actual or potential fault, wrongdoing, or liability against it in the action or in any  
13 other actions.

### 14 **III. SETTLEMENT TERMS**

15 Material terms of the Settlement include the following:

16 1. Settlement Class Definition. The parties request that the Court certify a  
17 settlement class for settlement purposes only as follows: "All natural persons who,  
18 while physically present in the State of California, either: (a) placed a telephone call  
19 to The Cosmopolitan between July 12, 2011 and August 3, 2012 that was recorded  
20 by The Cosmopolitan; or (b) received a telephone call from The Cosmopolitan  
21 between July 12, 2011 and February 20, 2015 that was recorded by The  
22 Cosmopolitan. Excluded from the Class are all employees of The Cosmopolitan, all  
23 attorneys and employees of plaintiff's counsel, as well as the judicial officers to  
24 whom the Lawsuit is assigned and their court staff." Agreement, Section III.A.  
25 (Hannink Decl. Ex. 1 at 4).

26 2. Appointment of Class Representative and Class Counsel. For  
27 settlement purposes only, the parties request that Sasan Mirkarimi be appointed as  
28 Class Representative; that Dostart Clapp Hannink & Coveney, LLP, be appointed as

1 Class Counsel; and that CPT Group, Inc. be appointed as Claims Administrator.  
2 Section III.C.-E. (Ex. 1 at 4-5).

3 3. Monetary Consideration. The monetary consideration to be paid by  
4 The Cosmopolitan (the “Settlement Amount”) is the principal amount of Fourteen  
5 Million Five Hundred Thousand Dollars (\$14,500,000), plus interest accruing at the  
6 then-applicable rate pursuant to 28 U.S.C. § 1961 beginning on the Judgment Entry  
7 Date and continuing through the date The Cosmopolitan pays the Settlement  
8 Amount to the Claims Administrator. Of that amount, The Cosmopolitan will pay  
9 Three Hundred Thousand Dollars (\$300,000) to the Claims Administrator by wire  
10 transfer no later than fifteen (15) days following the Preliminary Approval Date.  
11 The remainder of the Settlement Amount will be paid to the Claims Administrator  
12 by wire transfer by the later of: (a) ten (10) days after the Effective Date, or (b) if a  
13 Class Member files a timely objection to the Settlement, then thirty (30) days after  
14 the Effective Date. Section IV.A. (Ex. 1 at 5).

15 4. Change in Business Practices. In addition to the monetary  
16 consideration, for a period of at least three years following entry of judgment, The  
17 Cosmopolitan will not record a telephone call with a person who is using a  
18 California telephone number without first informing the person at the outset of the  
19 call that the call may be recorded. Section IV.C. (Ex. 1 at 6).

20 5. Information to the Claims Administrator. Within fifteen (15) days after  
21 the Preliminary Approval Date, The Cosmopolitan will provide the Claims  
22 Administrator and Class Counsel with a “Customer Spreadsheet,” which will list the  
23 name, address, and telephone number of each California Customer whose  
24 information was entered into The Cosmopolitan’s reservation database or its Identity  
25 Membership & Awards database between July 12, 2011 and August 3, 2012.  
26 Section VII.D.1. (Ex. 1 at 7). Further, the parties are in the process of preparing a  
27 “Call Spreadsheet,” which will list (to the extent of available records) the date and  
28 telephone number for each call that The Cosmopolitan received from, or placed to, a

1 California telephone number during the relevant period. Section VII.D.2. (Ex. 1 at  
2 8). The Claims Administrator will also be provided with a “Telephone Number  
3 Spreadsheet,” which lists the telephone numbers used by The Cosmopolitan during  
4 the relevant period for calls with California customers on lines that were capable of  
5 being recorded. Section VII.D.3. (Ex. 1 at 8). The foregoing information will be  
6 used by the Claims Administrator to disseminate Class Notice and to validate Claim  
7 Forms, as further described below.

8         6.     Mailed Notice. No later than thirty (30) days following the Preliminary  
9 Approval Date (the “Notice Date”), the Claims Administrator will mail to the last-  
10 known home address of each person who appears in the Customer Spreadsheet the  
11 Court-approved Class Notice (Exhibit B to the Agreement, see Ex. 1 at 30-34), as  
12 well as a Green Claim Form (Exhibit C to the Agreement, Ex. 1 at 36), which will  
13 be printed on green paper and will contain the person’s name and a bar code or  
14 control number for tracking purposes. Section VII.F. (Ex. 1 at 8-9). Prior to the  
15 mailing, the Claims Administrator will run the last-known home address  
16 information in the Customer Spreadsheet through the U.S. Postal Service’s National  
17 Change of Address (“NCOA”) database and update the Customer Spreadsheet as  
18 necessary. *Ibid*. For a period of forty-five (45) days following the Notice Date, if  
19 any settlement documents are returned to the Claims Administrator as undeliverable,  
20 the Claims Administrator will perform a skip-trace and/or other customary address  
21 search in an attempt to locate a valid address, and if a new address is obtained, re-  
22 mail the settlement documents to that address. *Ibid*. The proposed form of mailed  
23 notice describes the terms of the Settlement, advises recipients that in order to  
24 potentially qualify for a settlement payment, the individual must submit a Claim  
25 Form, and advises that complete details regarding the Settlement can be obtained by  
26 accessing the settlement website or contacting Class Counsel.

27         7.     Publication Notice. In addition to mailed notice, the Claims  
28 Administrator will publish notice on three separate occasions in each of the *Los*

1 *Angeles Times*, the *San Francisco Chronicle*, the *San Diego Union-Tribune*, the  
2 *Sacramento Bee*, and the *Fresno Bee*. Section VII.G. (Ex. 1 at 9); Exhibit D to the  
3 Agreement (Ex. 1 at 38). The publication notice will advise readers that a proposed  
4 class action settlement has been reached, state the deadline for filing claims, opting  
5 out, or objecting to the Settlement, and state that more information about the  
6 Settlement is available on the settlement website or from Class Counsel.

7 8. Settlement Website. In addition to mailed and published notice, the  
8 Claims Administrator will establish a settlement website on which will be made  
9 available the Class Notice, the Claim Form, the Agreement, the complaint, the order  
10 granting preliminary approval of the Settlement, and any other materials agreed to  
11 by the Parties. Section VII.H. (Ex. 1 at 9).

12 9. Claim Forms. After the notice mailing date, Class Members will have  
13 60 days to submit a Claim Form, to request exclusion from the class, or to file and  
14 serve a written objection to the Settlement. Sections VII.J - VII.L. (Ex. 1 at 10-13).

15 10. Claim Validation. The Claims Administrator will validate Claim  
16 Forms by comparing the name and/or telephone number information on the Claim  
17 Form against the information in The Cosmopolitan's records. Section VII.J. (Ex. 1  
18 at 10). A claimant who completes and timely returns a Green Claim Form  
19 (indicating that The Cosmopolitan's records identify the individual as a California  
20 customer) will qualify as a Participating Class Member without further analysis.  
21 Section VII.J.1. (Ex. 1 at 10). An individual who completes and timely returns a  
22 Blank Claim Form will qualify as a Participating Class Member if either (a) his or  
23 her telephone number (as reported by the individual on the Claim Form) appears in  
24 the Call Spreadsheet or (b) the individual submits telephone bills or other evidence  
25 indicating that the claimant participated in a call with The Cosmopolitan on one of  
26 the recorded lines during the relevant period. Section VII.J.2. (Ex. 1 at 10-11).  
27 Claim Forms are to be signed under penalty of perjury and attest that the claimant  
28 participated in a call with The Cosmopolitan during the relevant period while

1 physically present in California.

2       11. Fee Motion. In advance of the deadline for filing objections, pursuant  
3 to *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988  
4 (9th Cir. 2010), Class Counsel will file a motion for an award of attorneys' fees of  
5 up to thirty percent (30%) of the Settlement Amount, plus actual litigation expenses  
6 not to exceed \$150,000. Section V. (Ex. 1 at 6). That motion will also request a  
7 service payment to plaintiff not to exceed \$30,000. Section VI. (Ex. 1 at 6-7).  
8 These amounts are all subject to Court approval.

9       12. Distribution of Settlement Amount. Following final court approval and  
10 occurrence of the Effective Date, each Participating Class Member will be entitled  
11 to receive a pro-rata portion of the Net Settlement Amount (the amount available for  
12 distribution after payment of settlement costs including attorneys' fees, litigation  
13 expenses, a class representative enhancement award, and expenses of  
14 administration). Section VIII.A. (Ex. 1 at 13). Any check that is not cashed within  
15 one hundred and twenty (120) days of its mailing by the Claims Administrator will  
16 be void, and any portion of the Settlement Amount that remains unpaid at the end of  
17 120 days will be paid to a cy pres recipient proposed by the parties and approved by  
18 the Court, unless the Court orders otherwise. Section VIII.B. (Ex. 1 at 13-14).

19       13. Releases. Plaintiff will provide The Cosmopolitan with a general  
20 release of his individual claims. Section IX.A. (Ex. 1 at 14). The Cosmopolitan will  
21 provide plaintiff with a limited release. Section IX.B. (Ex. 1 at 14-15). Class  
22 Members will provide a limited release as follows: "Provided that the Effective  
23 Date occurs, Class Members (other than the Excluded Class Members) will release  
24 and discharge The Cosmopolitan, and each of The Cosmopolitan's past and present  
25 officers, directors, employees, shareholders, members, partners, agents,  
26 representatives, predecessors, successors, parents, subsidiaries, affiliates, assigns,  
27 insurance companies, and attorneys, from any and all claims during the Applicable  
28 Class Period arising from the facts alleged in the Lawsuit, or which could have been

1 alleged based on the facts pled in the Lawsuit, including all claims for violation of  
2 Penal Code sections 632, 632.7, and 637.2.” Section IX.C. (Ex. 1 at 15).

#### 3 **IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

##### 4 **A. The Standard for Preliminary Approval**

5 Court approval of a class action settlement involves a two-step process. The  
6 parties first submit the proposed terms of the settlement to the court for a  
7 preliminary fairness evaluation. If the preliminary evaluation of the settlement does  
8 not disclose a basis to doubt its fairness or other obvious deficiencies, the court then  
9 directs that notice be given to the class and sets a final fairness hearing. *Manual for*  
10 *Complex Litigation, Fourth*, § 21.632 (2004).

11 Preliminary approval should be granted if the proposed settlement falls  
12 “within the range of possible final approval.” *Gautreaux v. Pierce*, 690 F.2d at 616,  
13 621 n.3 (7th Cir. 1982); Conte & Newberg, *Newberg on Class Actions* (4th ed.  
14 2002), § 11.25 at pp. 38-39. Stated another way, preliminary approval is “a  
15 determination that there is what might be termed ‘probable cause’ to submit the  
16 proposal to class members and hold a full-scale hearing as to its fairness.” *In re*  
17 *Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980).

18 The policy of the federal courts is to encourage settlement before trial.  
19 *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989). “Litigation  
20 settlements offer parties and their counsel relief from the burdens and uncertainties  
21 inherent in trial. ... The economics of litigation are such that pretrial settlement may  
22 be more advantageous for both sides than expending the time and resources  
23 inevitably consumed in the trial process.” *Ibid.* The Ninth Circuit has recognized  
24 that “the very essence of a settlement is compromise.” *Officers for Justice v. Civil*  
25 *Service Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982). “[I]t is the very uncertainty of  
26 outcome in litigation and avoidance of wasteful and expensive litigation that induce  
27 consensual settlements.” *Id.* at 625.

1       The “universal standard” in evaluating the fairness of a settlement is whether  
2 the settlement is “fundamentally fair, adequate and reasonable.” *Officers for*  
3 *Justice*, 688 F.2d at 625. “[T]he court’s intrusion upon what is otherwise a private  
4 consensual agreement negotiated between the parties to a lawsuit must be limited to  
5 the extent necessary to reach a reasoned judgment that the agreement is not the  
6 product of fraud or overreaching by, or collusion between, the negotiating parties,  
7 and that the settlement, taken as a whole, is fair, reasonable and adequate to all  
8 concerned.” *Ibid.* The proposed settlement is not to be judged against a  
9 hypothetical or speculative measure of what might have been achieved by the  
10 negotiators. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir.  
11 1998), citing *Officers for Justice*, 688 F.2d at 625. Thus, even if the amount of a  
12 proposed monetary settlement is a fraction of the potential recovery, that does not  
13 render the settlement inadequate. *Linney*, 151 F.3d at 1242.

14       A proposed settlement is presumptively fair when (1) it is reached through  
15 arm’s-length negotiations, (2) the putative class is represented by experienced  
16 counsel, and (3) the parties have conducted sufficient discovery. *Wal-Mart Stores,*  
17 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2nd Cir. 2005). All of those factors are  
18 present in the instant case. The proposed settlement is the product of arm’s-length,  
19 non-collusive negotiations, overseen by a respected independent mediator (Hannink  
20 Decl. ¶ 14); the class is represented by experienced counsel (*id.*, ¶ 7); and the parties  
21 exchanged a significant amount of information through discovery so that plaintiff  
22 and his counsel are able to make an informed recommendation about the settlement  
23 (*id.*, ¶ 15). Thus, the Settlement is presumed to be fair.

24       In evaluating the fairness of a settlement, the district court can weigh a variety  
25 of factors, including the strength of the plaintiff’s case; the risk, expense,  
26 complexity, and likely duration of further litigation; the risk of maintaining class  
27 action status throughout the trial; the amount offered in settlement; the extent of  
28 discovery completed and the stage of the proceedings; the experience and views of

1 counsel; the presence of a governmental participant; and the reaction of the class  
2 members to the proposed settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
3 1026 (9th Cir. 1998). The relative degree of importance to be attached to any  
4 particular factor depends upon the circumstances of each case. *Torrisi v. Tucson*  
5 *Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Plaintiff submits that the  
6 pertinent factors warrant preliminary approval of the instant Settlement.

7 **B. Strength of Plaintiff's Claim and Risk of Further Litigation**

8 The Cosmopolitan has raised numerous defenses to the class claims. For  
9 example, The Cosmopolitan has contended that telephone calls involving its contact  
10 center could not give rise to an objectively reasonable expectation that the calls  
11 would not be recorded, in which case the calls would not qualify as "confidential  
12 communications" within the meaning of Penal Code § 632(c). Aside from asserting  
13 that plaintiff and the putative class could not establish the elements of the  
14 substantive claims, The Cosmopolitan also contends that even if plaintiff were to  
15 prevail, an award of aggregated statutory damages would violate the Excessive  
16 Fines and Due Process provisions of the United States and California Constitutions.

17 Regarding class certification, The Cosmopolitan has argued that individual  
18 issues would predominate over common issues, and that a class action would not be  
19 superior. In the call-recording context, two federal district courts have denied  
20 motions for class certification, and two panels of the California Court of Appeal  
21 have affirmed trial court orders denying class certification. *See Quesada v. Bank of*  
22 *America Investment Svcs.*, 2013 U.S. Dist. LEXIS 32588 (N.D. Cal. Feb. 19, 2013);  
23 *Torres v. Nutrisystem, Inc.*, 2013 U.S. Dist. LEXIS 66444 (C.D. Cal. Apr. 8, 2013);  
24 *Hataishi v. First American Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454  
25 (2014); *Kight v. CashCall, Inc.*, 231 Cal. App. 4th 112 (2014). On the other hand, at  
26 least one California Superior Court and one federal district court have granted  
27 motions for class certification. *See Greenberg v. E-Trade Financial Corp.*, L.A.  
28 Sup. Ct. No. BC360152 (Feb. 7, 2008) (Hannink Decl. Ex. 2); *Ades v. Omni Hotels*



1 *Management Corp.*, 2014 U.S. Dist. LEXIS 129689 (C.D. Cal. Sept. 8, 2014).  
2 Plaintiff believes the cases in which class certification was denied are factually  
3 distinguishable from this case. However, there is no doubt that a motion for class  
4 certification would be contested and there could be no certainty about the outcome.

5       Apart from risks associated with class certification and trial, if the litigation  
6 were to continue, the trial process itself and subsequent appeals would take years,  
7 with very substantial expenditures of time and resources by the parties and the  
8 Court, and without any guarantee of recovery for class members. The proposed  
9 settlement eliminates all litigation risks and ensures that the class members receive  
10 some compensation for their claims on a timely basis.

### 11       **C. Amount of the Proposed Settlement**

12       The Settlement will result in a substantial payment to Participating Class  
13 Members. Although the number of potential class members cannot be determined  
14 with precision, it is possible to estimate that number based on the call system  
15 metadata for June and July 2012. With respect to inbound calls, the metadata  
16 reflects that during those two months combined The Cosmopolitan received  
17 approximately 60,000 calls on recorded lines from about 26,000 unique California  
18 telephone numbers. Hannink Decl. ¶ 13. Extrapolating those numbers to a year-  
19 long period would lead to a figure of about 360,000 total inbound calls, from  
20 perhaps as many as 156,000 unique telephone numbers. However, it is likely that  
21 some individuals made calls in several different months throughout the year, and it  
22 is also likely that some individuals made calls using two different telephones. Those  
23 instances would be expected to somewhat reduce the number of new unique callers  
24 with each passing month.

25       With respect to outbound calls, the metadata reflects that during June and July  
26 2012 (combined), The Cosmopolitan made 270 recorded calls to 224 unique  
27 California telephone numbers. Hannink Decl. ¶ 13. Extrapolating those figures to  
28 the period for outbound calls would lead to a figure of about 5,670 outbound calls to

1 4,704 unique California telephone numbers. Again, this does not account for the  
2 likelihood that some individuals would be called in multiple months or that some  
3 individuals who received outbound calls also made inbound calls.

4 Based on the available information, Class Counsel believes that 150,000 is a  
5 reasonable estimate of the number of potential class members. Using that estimate,  
6 the instant Settlement would equate to approximately \$96.67 for each potential class  
7 member on a gross basis. To the extent the claims rate is less than 100%, the  
8 amount allocable to each Participating Class Member will be higher. This compares  
9 favorably to settlements in other Privacy Act cases. A few settlements have resulted  
10 in somewhat higher per-person figures, but most are significantly lower.

11 • In *McDonald v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS  
12 109080 (S.D. Cal. Aug. 5, 2014), District Judge Cynthia A. Bashant preliminarily  
13 approved a \$6,000,000 settlement for a class that included approximately 30,400  
14 identifiable individuals (average of approximately \$197 per identifiable class  
15 member). *Id.* at \*19-20. Judge Bashant later granted final approval. *See id.*, Case  
16 No. 13-cv-889-BAS (DHB) (S.D. Cal. Dec. 18, 2014), Dkt. 55.

17 • In *Reed v. 1-800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal.  
18 Jan. 2, 2014), District Judge Jeffrey T. Miller granted final approval of an  
19 \$11,700,000 settlement for a class that included approximately 100,000 identifiable  
20 potential class members (average of approximately \$117 per identifiable class  
21 member before court-approved deductions). *Id.* at \*3-5.

22 • In *Skuro v. BMW of North America, LLC*, Case No. 10-8672 GW  
23 (FFMx) (C.D. Cal.), the settlement involved 40,000 class members and gave them  
24 the option of selecting a six-month extension of the BMW Assist basic safety plan  
25 (valued by the parties at \$100) or making a claim for *up to* \$50 against a \$300,000  
26 settlement fund. *See* Notice of Motion and Unopposed Motion for Preliminary  
27 Approval of Class Action Settlement, *Skuro v. BMW*, *supra*, at 2, 6 (Hannink Decl.  
28 Ex. 3 at 55, 59). Depending on how many class members opted for a monetary

1 recovery, the actual payment amount was somewhere between the stated maximum  
2 of \$50 and a minimum of \$7.50.

3       • In *Marenco v. Visa Inc.*, Case No. 10-8022 DMG (VBKx) (C.D. Cal.),  
4 the court approved an \$18,000,000 settlement for a class that numbered  
5 approximately 600,000 individuals. See Memo. of P.&A. in Support of Plaintiff's  
6 Motion for Preliminary Approval of Class Action Settlement, *Marenco v. Visa*,  
7 *supra*, at 3 (Hannink Decl. Ex. 4 at 87). Thus, the average monetary recovery was  
8 approximately \$30.00 per class member.

9       • In *Zaw v. Nelnet Business Solutions, Inc.*, Case No. 3:13-cv-05788-RS  
10 (N.D. Cal.), the gross settlement amount was \$1,188,110 and there were  
11 approximately 104,100 potential class members. See Memo. of P.&A. in Support of  
12 Joint Motion for Preliminary Approval of Class Action Settlement, *Zaw v. Nelnet*,  
13 *supra*, at 13 (Hannink Decl. Ex. 5 at 128). Thus, the settlement was approximately  
14 \$11.41 per class member.

15       • In *Batmanghelich v. Sirius XM Radio, Inc.*, Case No. 09-9190 VBF  
16 (JCx) (C.D. Cal.), the case settled for \$9,480,000 on behalf of a class estimated to  
17 include more than 1,000,000 class members. See Renewed Notice of Motion and  
18 Unopposed Motion for Preliminary Approval of Class Action Settlement,  
19 *Batmanghelich v. Sirius*, *supra*, at 5, 9 (Hannink Decl. Ex. 6 at 152, 156). Thus, the  
20 average monetary recovery was approximately \$9.48 per class member.

21       • In *Greenberg v. E-Trade Financial Corporation*, L.A. Sup. Ct. No.  
22 BC360152 (May 11, 2009), the case settled for \$7.5 million. The class potentially  
23 could have included as many as 1,000,000 customers. See Notice of Motion and  
24 Motion for Preliminary Approval of Class Action Settlement *etc.* and Memo. of  
25 P.&A. in Support Thereof, *Greenberg v. E-Trade*, *supra*, at 1, 10 (Hannink Decl.

1 Ex. 7 at 178, 187). Thus, the monetary recovery per class member could have been  
2 as low as \$7.50.<sup>1</sup>

3 Thus, viewed in the context of other Privacy Act settlements, the monetary  
4 recovery in this case is large in both absolute and relative terms, and represents a  
5 very significant recovery on behalf of class members.

6 **D. Extent of Discovery Completed and Stage of the Proceedings**

7 As summarized above in Section II.B, discovery in this action was extensive  
8 and hard-fought. Based on that discovery, plaintiff and his counsel are sufficiently  
9 familiar with the facts of this case and the applicable law to make an informed  
10 judgment as to the fairness of the Settlement. Hannink Decl. ¶ 15.

11 **E. Experience and Views of Counsel**

12 Class Counsel, the law firm of Dostart Clapp Hannink & Coveney, LLP, has  
13 been appointed as lead or co-lead class counsel in more than 50 certified class  
14 actions. Class Counsel believes the Settlement is fair, reasonable, and in the best  
15 interests of the class members. Hannink Decl. ¶¶ 6, 15.

16 **F. Reaction of the Class to the Settlement**

17 Class members will have an opportunity to object or opt-out of the settlement.  
18 Class Counsel will report on the reaction of the class members at the final approval  
19 hearing.

20 **V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

21 At the preliminary approval step, a district court must also determine that a  
22 class should be certified for settlement purposes. In many similar cases alleging  
23 violation of the Privacy Act, district courts have held that it is proper to certify such  
24 classes for settlement purposes. *See, e.g., Reed v. 1-800 Contacts, Inc.*, No. 12-cv-  
25 \_\_\_\_\_

26 <sup>1</sup> The *Marengo*, *Batmanghelich*, and *Greenberg* settlements included class members  
27 located in multiple states. In those cases, California class members received more  
28 than class members in the other states.

1 2359 JM (BGS) (S.D. Cal. Aug. 29, 2013), Dkt. 45 at 3; *McDonald*, 2014 U.S. Dist.  
2 LEXIS 109080, at \*7-16.

3 **A. The Settlement Class Meets the Requirements of Rule 23(a)<sup>2</sup>**

4 A class is appropriate for certification if: “(1) the class is too numerous,  
5 making joinder of the parties impracticable; (2) common questions of law or fact  
6 exist among the class members; (3) the claims of the class representatives are typical  
7 of the claims of the class; and (4) the class representatives will adequately represent  
8 the interest of the class.” *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998).  
9 Each of those requirements is met in the instant case.

10 **1. Numerosity**

11 Fed. R. Civ. P. 23(a)(1) requires that the class be “so numerous that joinder of  
12 all members is impracticable.” In *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d  
13 Cir. 2001), the court observed that if a class exceeds 40 members, the numerosity  
14 requirement is satisfied. Here, the class includes thousands of individuals. Hannink  
15 Decl. ¶ 13.

16 **2. Commonality**

17 The commonality requirement serves two purposes: (1) ensuring that absentee  
18 members are fairly and adequately represented and (2) ensuring practical and  
19 efficient case management. *Walters*, 145 F.3d at 1045, citing *Gen. Tel. Co. of*  
20 *Southwest v. Falcon*, 457 U.S. 147 (1982). The standard under Rule 23(a)(2) is  
21 “permissive.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).  
22 Here, all class members were allegedly the subject of undisclosed recording by The  
23 Cosmopolitan. Thus, the class members’ claims are legally and factually similar on  
24 at least some issues.

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25 <sup>2</sup> As set forth in the Settlement Agreement, Defendant denies any and all allegations  
26 of liability or wrongdoing asserted in the action and denies that any of the claims  
27 alleged in the action are suitable for class certification other than for purposes of  
28 settlement.

1                   **3.     Typicality**

2           A class representative's claims are typical if they are "reasonably co-  
3 extensive with those of absent class members; they need not be substantially  
4 identical." *Hanlon*, 150 F.3d at 1020. "The commonality and typicality  
5 requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining  
6 whether under the particular circumstances maintenance of a class action is  
7 economical and whether the named plaintiff's claim and the class claims are so  
8 interrelated that the interests of the class members will be fairly and adequately  
9 protected in their absence." *General Tel. Co. of Southwest*, 457 U.S. at 157 n.13.  
10 Here, Plaintiff's claim is typical. Plaintiff's claim is that all class members'  
11 telephone conversations with The Cosmopolitan were recorded without consent.

12                   **4.     Adequacy**

13           "[T]wo criteria for determining the adequacy of representation have been  
14 recognized. First, the named representatives must appear able to prosecute the  
15 action vigorously through qualified counsel, and second, the representatives must  
16 not have antagonistic or conflicting interests with the unnamed members of the  
17 class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).  
18 The adequacy requirement is met here. Plaintiff has no interests that are  
19 antagonistic to those of the other class members and has retained counsel  
20 experienced in class action litigation. Hannink Decl. ¶¶ 7, 16.

21                   **B.     The Settlement Class Meets the Requirements of Rule 23(b)(3)**

22           The predominance inquiry tests whether proposed class is "sufficiently  
23 cohesive to warrant adjudication by representation." *Amchem Products v. Windsor*,  
24 521 U.S. 591, 623 (1997). "When common questions present a significant aspect of  
25 the case and they can be resolved for all members of the class in a single  
26 adjudication, there is clear justification for handling the dispute on a representative  
27 rather than on an individual basis." 7A Charles Alan Wright, Arthur R. Miller &  
28 Mary Kay Kane, *Federal Practice & Procedure* § 1778 (2d ed. 1986).

1 Plaintiff contends the predominant factual and legal issues include whether  
2 The Cosmopolitan recorded telephone conversations without providing a notice at  
3 the outset of the call, and, for the claim based on Penal Code § 632, whether such  
4 calls could give rise to an objectively reasonable expectation that the calls would not  
5 be recorded. *See Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 118 (2006)  
6 (holding that “[a] business that adequately advises all parties to a telephone call, at  
7 the outset of the conversation, of its intent to record the call would not violate the  
8 provision.”). Here, The Cosmopolitan had standardized procedures with respect to  
9 recording telephone calls, and did not institute procedures to notify callers that calls  
10 are recorded until after the lawsuit was filed. Hannink Decl. ¶ 11. Thus, it is  
11 appropriate to resolve these claims via settlement on a classwide basis.

12 The superiority prong under Rule 23(b)(3) involves a comparison of the  
13 potential alternative mechanisms for resolving the dispute. *Hanlon*, 150 F.3d at  
14 1023. Here, the only alternative to a class action would be thousands of individual  
15 actions. That would be neither practical nor efficient. Individual litigation would  
16 consume scarce judicial resources, impose substantial additional burdens and  
17 expense on the litigants, and present a risk of inconsistent rulings. Accordingly,  
18 resolution through a class settlement is superior.

## 19 **VI. THE PROPOSED CLASS NOTICE IS PROPER**

20 Pursuant to Fed. R. Civ. P. 23(e)(1), “[t]he court must direct notice in a  
21 reasonable manner to all class members who would be bound by the proposal.”  
22 “The notice must clearly and concisely state in plain, easily understood language:  
23 (i) the nature of the action; (ii) the definition of the class certified; (iii) the class  
24 claims, issues, or defenses; (iv) that a class member may enter an appearance  
25 through an attorney if the member so desires; (v) that the court will exclude from the  
26 class any member who requests exclusion; (vi) the time and manner for requesting  
27 exclusion; and (vii) the binding effect of a class judgment on members under Rule  
28 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). Notice is satisfactory if it “generally

1 describes the terms of the settlement in sufficient detail to alert those with adverse  
2 viewpoints to investigate and come forward and be heard.” *Churchill Village, LLC*  
3 *v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004).

4 Here, the proposed class notice (Exhibit B to the Agreement) describes the  
5 litigation, the terms of the Settlement, and the class members’ options. The Claims  
6 Administrator will mail the notice via first-class mail, postage prepaid, to the last-  
7 known addresses of identifiable California Customers, as updated through the U.S.  
8 Postal Service’s NCOA database. Section VII.F. and Ex. 1 at 8-9. This method  
9 satisfies due process. *Overton v. Hat World, Inc.*, 2012 U.S. Dist. LEXIS 144116, at  
10 \*5 (E.D. Cal. Oct. 4, 2012).

11 In addition, to ensure that notice reaches as many potential class members as  
12 possible, the Settlement also provides for Publication Notice. Section VII.G. and  
13 Ex. 1 at 9. The Publication Notice will be published three times in each of the *Los*  
14 *Angeles Times*, the *San Francisco Chronicle*, the *San Diego Union-Tribune*, the  
15 *Sacramento Bee* and the *Fresno Bee*. The Publication Notice describes the nature of  
16 the case, states the deadline for filing claims, opting out, or objecting to the  
17 Settlement, and advises readers that they can obtain more information from the  
18 settlement website or by contacting Class Counsel. If anyone who does not appear  
19 in the Customer Spreadsheet contacts the Claims Administrator to request a claim  
20 form, the Claims Administrator will provide that person with a Claim Form for the  
21 person to fill in and return. Section VII.G. (Ex. 1 at 9). Accordingly, the proposed  
22 class notice and the plan for circulation comply with Rule 23 and due process.

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1 **VII. CONCLUSION**

2 Based on the foregoing, plaintiff respectfully requests that the Court enter an  
3 order preliminarily approving the Settlement and set a final approval hearing for  
4 approximately 120 days thereafter.

5 Dated: May 8, 2015 DOSTART CLAPP HANNINK &  
6 COVENEY, LLP

7  
8 /s/ James T. Hannink  
9 JAMES T. HANNINK  
Attorneys for Plaintiff

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